IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.602 OF 2002

Krishna B. Gudulkar & Ors. ...Appellants

Vs.

Vithoba Dev Nabapur & Ors. ...Respondents

Ms J.P.Akolkar for the Appellants
Mr.G.H.Saluke for the Respondent No.1-A

CORAM: A.S.OKA, J.
DATED: MAY 5,2006.

P.C.:

1. Heard learned Advocates for the parties. The Appellants are the original defendants against whom a decree for possession has been passed in respect of an agricultural land. Admittedly, the Respondent No.1 is a public trust registered under Bombay Public Trusts Act, 1950 and the registration of the said trust was made prior to 1st April 1957. There is an exemption certificate granted in favour of the Respondent No.1 under section 88-B of the Bombay Tenancy and Agricultural Lands Act, 1948. The decree passed by the Trial Court has been confirmed in the Appeal.

2. The learned Advocate for the Appellants submitted that the settled position of law is that an agricultural tenant must be heard before issuing the certificate under section 88-B and in the facts of the case it is obvious that no

opportunity of being heard was given to the Appellants before issuing the certificate. A reliance was placed on the decision of the Division Bench of this Court reported in 1990 Mh.L.J. page 1183 (Keraba Dattu Borachate & Others vs. Sheshashai and Vishnu Trust). The learned Advocate further submitted that the Appellants are the deemed purchasers under section 32-G under of the Bombay Tenancy and Agricultural Lands Act, 1948 and therefore decree for eviction could not have been passed by the Civil Court. The third submission is based on the decision of the Apex Court reported in A.I.R. 1970 S.C. page 437 (Kalpana Devi Sansthan vs. the M.R.T. and ors.). It is submitted that the Respondent No.1-Trust cannot be an agriculturist and therefore the suit itself was not maintainable.

3. I have considered submissions. The perusal of the order dated 30th April 1963 granting certificate under section 88-B in favour of the Respondent No.1 shows that all the tenants appeared before the concerned authority before the exemption certificate was granted. Even assuming that the learned Advocate for the Appellants is factually right that opportunity was not granted, the case is covered by a decision of the learned Single Judge of this court in case of Sakharam Bala Mali Gaikwad Vs.Janardahan Balaji Phadnis reported in 2000 (1) Bombay Cases Reporter page 78. In the present case the trust was registered prior to 1st April

1957. In paragraph 11 the learned Judge has held thus :

"11. From the facts of both the two judgments of the Division Bench of this Court it will be clear that the tenants in those two cases had become the owners of the land on 1-4-1957 i.e. before the respective trusts were registered and before they applied for exemption certificate under section 88-B of the Tenancy Act. In the instance case, however, the trust was registered on 19-5-1953, and therefore, admittedly and clearly the tenant had not become and could not become the owner of the land on 1-4-1957 i.e on the tiller's day. It was the trust which was the owner of the land on 1-4-1957 and consequently certificate granted to the respondent under section 88-B cannot be interfered with. From both the judgments of the Division Bench it is clear that the date of registration of the trust has been held to be material date for the purpose of deciding ownership of the land on the tiller's day i.e. on 1-4-1957. In the Sri Laxminaryan Vs. Laxman case the Division Bench held that the tenant had become owner of the land on the Tillers' day i.e. on which the date the trust was not registered and hence no exemption certificate could be claimed by the trustees. In the instance case, the trust was

> registered in 1953 and consequently the trust was the owner of the land on tiller's day i.e. on 1-4-1957 and therefore, the tenant could not become owner of the land on 1-4-1957, and as such had no rights to be heard at the time of grant of certificate under section 88-B nor could he claim benefit of section 32-G of the Tenancy Act."

4. In view of the decision of the learned Single Judge and in view of the fact that there is no specific challenge by the Appellants to the said exemption certificate, the first submission of the learned Advocate has no merit. So far as the second submission is concerned, once there is a certificate under section 88-B, provisions of section 32-G of the said Act of 1948 will not apply to the said land.

5. So far as the third submission that the Respondent No.1 cannot hold an agricultural land is concerned, I find that the same was not agitated before the first Appellate Court. The learned Advocate for the Appellants submitted that the said point was taken in the Memorandum of Appeal. It is well settled that unless the point was argued before the first Appellate Court, the said court was under no obligation to consider the said submission. The said submission cannot be agitated in the Second Appeal. There is no merit in the Second Appeal and the same is dismissed with no order as to

costs.

Judge.